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No. 01-446

IN THE
SUPREME COURT OF THE UNITED STATES

WELLINGTON TRADE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* RICHARD E. FLAMM IN SUPPORT OF PETITION FOR *CERTIORARI*

Richard E. Flamm, Esq.
2840 College Avenue, Suite A
Berkeley, CA 94705
(510) 849-0123

Amicus Curiae

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28 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* OUT OF TIME

Pursuant to Sup. Ct. Rules 37.2(a) and 37.2(b), the prospective *amicus curiae*, Richard E. Flamm, Esq., hereby respectfully moves for leave to file the following Brief of *Amicus Curiae*.

The United States' Brief in Opposition, which was originally due in October of 2001, was filed with leave of the Court on November 14, 2001. As such, the Brief of *Amicus Curiae* is untimely under Sup. Ct. Rule 37.2(a).

Petitioner, Wellington Trade, Inc., has consented to the filing of this Brief, but the Respondent, United States, has withheld its consent and thereby opposes this filing. Accordingly, leave of the Court is required under Sup. Ct. Rule 37.2(b). The reasons for the United States' withholding consent have not been fully communicated by the United States, though counsel did communicate to counsel for Petitioner the fact that the United States would not give its consent.

As set forth in the Brief of *Amicus Curiae*, the movant is a leading authority and author of the nation's leading treatise on judicial disqualification. The movant was unable to undertake this project at a time before the United States' Brief in Opposition was filed. However, because the movant presents an entirely

different view of the questions this case presents than do either the Petitioner or the government, the movant believes that his brief will likely aid the Court's decision whether to grant *certiorari*.

Respectfully submitted,

Richard E. Flamm
2840 College Avenue, Suite A
Berkeley, CA 94705
(510) 849-0123

Amicus Curiae

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INTERESTS OF THE *AMICUS CURIAE*

I am an attorney at law duly licensed to practice before this Court, as well as the state courts of California and many federal district courts and appellate courts of appeals.[1/]

I have practiced law for more than 20 years. For more than 6 years I have confined my practice to advising, and sometimes representing, clients on matters of legal and judicial ethics. I have written numerous articles, and given frequent lectures on these topics. I am also the author of a nationwide treatise – *Judicial Disqualification: Recusal and Disqualification of Judges* – which was first published by Little, Brown & Company of Boston in 1996. My treatise examines in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals.

I have taught the subject of Professional Responsibility at Boalt Hall Law School (The University of California at Berkeley), and will be

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1/ Pursuant to Sup. Ct. Rule 37.6, *Amicus* certifies that this brief was authored entirely by the *Amicus Curiae*. Petitioner, Wellington Trade, Inc., made a partial monetary contribution to the preparation of the brief. Pursuant to Rule 37.3 of the Rules of the Court, counsel for Wellington Trade, Inc. sought the United States' consent to the filing of this brief, but the United States withheld its consent.

teaching the course again this Spring at Golden Gate University School of Law. On account of my academic and legal work in this field, I am very interested and concerned about the status and development of the law of judicial disqualification.

I write to provide this Court with my opinion why the questions this case presents are important ones the Court should resolve.

SUMMARY OF ARGUMENT

In denying Petitioner's motion for *vacatur* as "untimely filed," the Eleventh Circuit neglected to say whether it had reached this conclusion because it had found that Petitioner had impliedly waived its right to seek Judge Collier's disqualification, or if it concluded that such a result was warranted, on "timeliness" grounds, even if there was no such waiver. Assuming, *arguendo*, that the court held that Petitioner impliedly waived the right to seek disqualification, the court failed to specify whether it believed that, to be timely, Petitioner would have had to have raised its objection prior to oral argument, prior to the court's decision, or at some indeterminate later point in time.

In my opinion, this Court should grant the Petition and take review to decide three questions. First, is there a requirement that a party who discovers that a federal circuit judge is subject to disqualification pursuant to 28 U.S.C. Section 455 must move to

disqualify the judge prior to oral argument or the issuance of the decision on appeal – even if the party is unaware of the basis for disqualification at that time? If there is no such requirement, may the court deny a motion to vacate the decision of the appellate panel which the allegedly disqualified judge participated in, on "untimeliness" grounds, in the absence of any finding that any compelling reason for such a ruling exists? Finally, must a court which decides to overrule an objection, pursuant to Section 455, issue a statement explaining the reasons for its decision and the facts on which it was based?

ARGUMENT

A. Standard of Review.

This Court has not yet specifically addressed the applicable standard of review in the context of a motion for *vacatur* brought pursuant to Section 455. Nevertheless, the government asserts – without benefit of support – that the appropriate standard in this case is "abuse of discretion." Government Opposition ("Oppo."), p. 1. I do not believe that this is so.

It seems to me that, regardless of whose characterization of the questions presented by this appeal is more accurate, that question is purely one of law. This Court has made it clear that pure questions of law – such as those presented by this Petition – are subject to *de novo* review. *Elder v. Holloway*, 510 U.S.

510, 516 (1994). In the analogous context of a Section 144 motion, the Seventh Circuit Court of Appeals held that the question of whether an affidavit of disqualification is untimely "is a question of law, for which the appropriate standard of review is *de novo*." *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), *cert. denied sub nom. DiSalvo v. United States*, 475 U.S. 1095 (1985).

I do not see that the Petition raises any question of fact. But even if it did, this Court has indicated that it is committed to the *de novo* standard of review for mixed questions of law and fact as well. *Brecht v. Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring). Likewise, the Fourth Circuit Court of Appeals has held that a mixed question of law and fact to pertaining to an issue of judicial bias is subject to *de novo* review. *Nakell v. Attorney General*, 15 F.3d 319, 324 (4th Cir. 1994).

Since the applicable standard of review is *de novo* – not abuse of discretion – this Court owes no deference to the Eleventh Circuit's decision to deny Petitioner's Motion to Vacate. On the contrary, this Court is free to substitute its judgment for that of the lower court, and should do so if it believes the lower court was wrong.

B. Confusion about the Relationship Between an Untimely Filing and Implied Waiver.

It would appear to be clear beyond peradventure (and the government in this case does not dispute) that a party has a constitutional right to have his cause heard by an unbiased tribunal. See e.g., *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). That this is a fundamental right can hardly be gainsaid. In fact, of all the rights a party is entitled to, none are more fundamental than this.

Of course, even rights of a constitutional dimension are not absolute. They may be overridden when necessary, to protect a countervailing public interest, or when another compelling reason exists. Likewise, such rights may be expressly waived. Here, however, no compelling reason for overthrowing Petitioner's right to an impartial tribunal has been established – or even identified; and Petitioner did not expressly waive the right to have its cause heard by an unbiased tribunal. Since Petitioner did not expressly waive the right to an unbiased tribunal, the Eleventh Circuit must have either concluded that Petitioner impliedly waived that right, or that there are situations in which a party can be deprived of that right without waiving it.

At first blush, precisely what the Eleventh Circuit meant by its holding that Petitioner's motion to

vacate was "untimely filed" is not entirely clear. In some jurisdictions, the terms "untimely" and "waiver" are analytically linked in such a way that, should the court find that a party has not exercised a right in a timely manner, it will ineluctably conclude that the party has waived its right to seek relief. See, e.g., *Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001) (stating that a party who fails to file a timely jury demand waives his right to trial by jury).

In the recusal context, a host of courts have conflated the "timeliness" and "waiver" concepts; holding or implying that a party who does not raise an issue of disqualification, pursuant to Section 455, promptly upon learning the facts relevant to disqualification "waives" its right to complain. The Eleventh Circuit Court of Appeals is one of the courts which has so held. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) ("a challenger must object to a biased judge in a motion to recuse before trial or as soon as the alleged bias is discovered; again, the penalty for failing timely to object is waiver of the objection").

Other courts – including panels of the Third, Seventh and Ninth Circuit Courts of Appeals – have reached similar conclusions. *See Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991) ("even if the trial judge did abuse his discretion, Datagate waived its right to have the judgment vacated by failing to move for disqualification in a timely fashion"); *United States v. Nobel*, 696 F.2d 231, 237

(3d Cir. 1982) (finding waiver under § 455(e) based on a party's failure to make a timely objection once the basis for disqualification was fully disclosed), *cert. denied*, 462 U.S. 1118 (1983). *Cf. Schurz Communs. v. FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992) (Posner, J.) ("The failure to bring potentially dispositive authority to my attention – especially Barnes, the circuit's latest word on the issue of timeliness – could be thought to waive the issue").

But not every court has perceived that the concepts of "waiver" and "untimeliness" are inextricably linked. This past year, the Second Circuit Court of Appeals noted, in *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000), that the terms waiver and untimeliness "present a potentially confusing issue of terminology." The court pointed out that, while "the cases do not always clearly distinguish between them, waiver and untimeliness are distinct issues":

> Waiver is a renunciation – whether expressly through words or implicitly through behavior – of the right to seek recusal. Untimeliness, on the other hand, is merely a failure to seek recusal when it should first have been sought, that is, as soon as the facts on which it is premised are known to the parties. The confusion arises because untimeliness in making a motion for recusal can sometimes constitute the basis for finding an implied

> waiver. But the distinction is a critical one, because while waiver - whether express or implied - will preclude appellate courts from entertaining a recusal claim, untimeliness need not do so. *See United States v. Olano*, 507 U.S. 725 (1993) (distinguishing between "forfeiture" of a claim, which results from failure to assert the claim in a timely way, and which does not prevent an appellate court from correcting a plain error by the trial court, and "waiver," which is the "intentional relinquishment or abandonment of a known right," and which permanently extinguishes the right to raise a claim).

See also United States v. York, 888 F.2d 1050, 1055 (5th Cir. 1989). *Cf. In re Kansas Pub. Emples. Retirement Sys.*, 85 F.3d 1353, 1363 ("While it is true that a § 455(b)(1) objection cannot be waived, it is still subject to the timeliness requirement of our cases"). *But see Polizzi v. United States*, 926 F.2d 1311, 1320 (2d Cir. 1991) ("We agree with the Government that Polizzi waived the claim that Judge Leval should have recused himself when he failed to timely move for such recusal pursuant to 28 U.S.C. § 144 or 28 U.S.C. § 455").

From the Eleventh Circuit's concise ruling, it is impossible to know whether it concluded that Petitioner

impliedly waived the right to complain of Judge Collier's qualification to sit on the appeal, or that Petitioner's alleged failure to seek relief in a "timely" fashion warranted the court in denying further review even in the absence of such a waiver. However, in light of that Circuit's reasoning in *Pate*, I assume that the court in this case (impliedly) held that Petitioner impliedly waived its right to seek Judge Collier's disqualification by not seeking such relief in a more expeditious fashion.

This assumption does not resolve the confusion generated by the court's decision, however, because even assuming that the court found that Petitioner had impliedly waived its right to raise the disqualification issue – and not merely relied on its subjective belief that the motion to vacate was, in some manner, untimely – it is unclear whether the court arrived at this conclusion because it thought Petitioner should have raised this issue before oral argument on the appeal, before the appellate court issued its judgment in the case, or at some indeterminate point after the court's judgment became final.

In some cases, the failure to specify the precise grounds on which the court reached its conclusion could be significant; and, as discussed below, I believe that this Court should accept review if – for no other reason – to provide guidance to the lower courts on the vital importance of issuing specific findings of fact and conclusions of law when denying motions which raise

non-frivolous questions as the impartiality of a federal judge. In this case, however, I am of the impression that the precise point in time at which the court concluded Petitioner's motion should have been brought is of no practical significance because, under each of these three scenarios, the court's decision is neither supported by the record nor by the rationale of the "implied waiver" rule.

C. The Motion Was Not Untimely Merely Because It Was Not Made Before Oral Argument.

Petitioner appears to believe that the court decided that Petitioner's motion was untimely because it was not brought before the appellate hearing. Petition 16-17. It is not entirely clear that this is the case; but, assuming it is, I believe Petitioner has good cause to complain.

Rules and regulations do not exist in the abstract – they are adopted for a reason. The requirement that an objection to a federal judge pursuant to Section 455 be made in a "timely" manner is no different. Of course, not every jurisdiction has agreed that there even is such a requirement, but those that have are fairly consistent in explaining the rationale for it: the timeliness rule was designed primarily to discourage parties from holding back on filing a Section 455 motion for tactical purposes, such as judge-shopping or delay. *See, e.g., In re IBM Corp.*, 45 F.3d 641, 643 (2d

Cir. 1995) ("a prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters"); *In re Anwiler*, 958 F.2d 925 (9th Cir. 1992).

For the purposes of this brief, I do not quarrel with the view that, in a situation where a party alleges that a federal district court judge is biased or appears to be so, a requirement that the moving party must raise this issue in a "timely" fashion – which is usually interpreted to mean within a reasonable time after learning the grounds on which the disqualification challenge is made – may sometimes make sense. But in proceedings before the district court, parties generally learn who the judge will be long before a dispositive hearing or trial takes place. As a consequence, it is possible that a party could learn of grounds for judicial disqualification, but purposefully delay bringing a section 455 challenge, in order to "sample the temper of the court" before deciding whether to seek to get rid of him. *See United States v. Alabama*, 828 F.2d 1532 (5th Cir. 1987), *cert. denied sub nom. Board of Trustees v. Auburn University*, 487 U.S. 1210 (1988).

The same is true of appeals and petitions brought to this Court. Parties always know who is sitting on this Court well in advance of oral argument. If there was no requirement that a section 455 challenge be brought in a "timely" fashion, it is not unforeseeable that a party might hold back on making such a challenge until it had a chance to test the Court's reaction to its oral

argument. It is far from clear, however, that the same situation exists in situations where an appeal has been made to a federal circuit court.

The government says that it does not see the "justification for treating court of appeals judges differently from other types of judges" – or "why it is important that most cases dealing with judicial disqualification concern district judges, rather than appellate judges." Oppo., p. 9. The fact is, however, that the situation which exists when a federal appellate panel convenes to hear oral argument on an appeal is markedly different from the two situations, described above, in which the other two tiers of the federal judiciary are called upon to decide a dispute.

The parties to a federal appeal typically receive extremely short notice of the composition of the appellate panel that will hear their appeal.[2/] In fact, as Judge Posner observed in *Schurz Communs. v. FCC*, 982 F.2d 1057 (7th Cir. 1992), in some jurisdictions the parties may not learn who will hear their cause until the very day on which they appear for oral argument. *Id.* at 1060. As a consequence, unless a party or its counsel happens to be in possession of information which makes it aware of a potentially disqualifying

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2/ This is a case in point. Petitioner did not learn of the composition of the appellate panel in this case until April 28, 1994 – three months *after* it filed its Answer Brief and Initial Brief on Cross Appeal, and only 26 days before oral argument.

circumstance on that day, it is highly unlikely to discover that disqualifying circumstance before oral argument in the case takes place.[3/]

Since, as a practical matter, the parties to a federal appeal will rarely be aware of the grounds for disqualifying a federal circuit court judge before oral argument, the possibility that they will purposefully withhold a challenge to an appellate judge's qualification to act in order to "sample the court's temper" is virtually non-existent. In my opinion, therefore, the primary rationale for the timeliness requirement – the concern about a challenge being withheld for tactical reasons – has no applicability in this situation.

For two centuries this honorable Court has recognized that when the reason for a rule does not apply to a particular state of facts, neither should the rule. *See Green v. Liter*, 12 U.S. 229 (1814) (Story, J.) ("The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex*"). *See*

[3/] It might be argued that, because there are a finite number of judges who sit in any one circuit, parties could investigate the possibility that any of them would be disqualified from presiding over an appeal. For all but the most "well heeled" parties this would seem to be unrealistic, however; and, in any event, parties would have no reason to investigate judges who, like the challenged judge in this case, were assigned to the sit on the court by designation.

also Zadvydas v. Davis, 533 U.S. 678 (2001), citing 1 E. Coke, Institutes *70b (the rationale of a legal rule no longer being applicable, that rule itself no longer applies); *United States v. Applied Pharm. Consultants*, Inc., 182 F.3d 603 (8th Cir. 1999) ("[H]ere, th[e] reason does not apply, and therefore the rule should not apply").

D. The Motion Was Not Untimely Because it Was Not Made Before the Eleventh Circuit Reversed Petitioner's Judgment.

Assuming, as I do, that a party who was unaware of the grounds for objecting to a federal appeals judge at the time of oral argument cannot realistically be found to have impliedly waived the right to challenge the judge's qualification to participate in the appellate panel by not objecting prior to that time, the next question is whether the Eleventh Circuit could have properly concluded that Petitioner impliedly waived that right by not raising the issue before the Court issued its judgment.

It is possible that a party could learn of the grounds for an appellate judge's disqualification after oral argument, but before a judgment has been issued. In such a situation, a finding that the party impliedly waived its right to seek relief might conceivably be justified; if not necessarily on "judge-shopping" grounds, perhaps on the basis of concerns about judicial economy. *See e.g. Schurz, supra.* at p. 1060 ("[moving

parties] could have filed a motion to disqualify me after the argument but before the decision. If they improbably feared that the case would be decided before they could draft and file the motion, they could had asked the court to delay its decision. In fact the court took more than a month to decide the case and during this period no motion to disqualify was filed. The movants followed none of the courses of action that was open to them. They waited until two weeks after the decision was handed down before filing the motion to disqualify").

As a host of courts have recognized, however – including the Eleventh Circuit Court of Appeals in *Hicks v. Talbott Recovery Sys.*, 196 F.3d 1226 (11th Cir. 1999) – waiver is defined as the intentional and voluntary relinquishment of a known right. It is one thing to say that a party may be found to have impliedly waived its right to object to a judge's qualification to sit by not moving promptly after learning of the facts warranting disqualification, and quite another to say that a party may waive this right by not objecting by a particular point in a proceeding – whether it was reasonably unaware of the grounds for disqualification or not.

Here the Eleventh Circuit did not find, expressly or impliedly, that Petitioner learned of the basis for its Section 455 challenge after oral argument was completed, but before the Eleventh Circuit rendered its decision. Perhaps more to the point, there appears to be

no record evidence which would have warranted the court in making such a finding. It appears, therefore, that if the court properly determined that Petitioner's motion was untimely, this must be because the court impliedly found that Petitioner did not move fast enough to see that the court's judgment was set aside after judgment was entered.

E. The Motion Was Not Untimely Merely Because it Was Not Made Earlier.

At first blush, the Eleventh Circuit's implicit finding – that Petitioner waited too long after issuance of judgment to seek relief – might not seem unreasonable. After all, as the government points out in its Opposition, it appeared that the case "had been finally disposed of almost six years earlier." Oppo. p. 1. As previously noted, however, a party's right to have its cause heard by an impartial tribunal raises constitutional concerns. Although such a right may be subject to override for compelling reasons, an analysis of the record makes it is difficult to fathom a compelling basis for denying Petitioner of that right here.

The primary rationale for an implied waiver rule is the same as that which justifies a timeliness requirement – to nullify the rewards of "sand-bagging" and to prevent parties from seeking judicial disqualification after obtaining an insight into their views as to the merits of the case. Clearly, such a

tactical motivation cannot possibly be suspect after the point in time at which the court has rendered its judgment against that party. Likewise, while delay is sometimes a strategic consideration in withholding such a challenge, it is difficult to conceive of any tactical reason a party whose judgment has been reversed by the Court of Appeals could possibly have for delaying seeking relief from that judgment. Consequently, if there is a rationale for a timeliness/waiver rule in a situation where a party discovers the grounds for disqualification post-judgment, it must be something else.

As previously noted, courts have suggested one possible alternative rationale for a timeliness/waiver rule: judicial economy. *See, e.g., In re National Union Fire Ins. Co.*, 839 F.2d 1226 (7th Cir. 1988) ("Counsel who perceive a problem under § 455(a) must not tarry, for delay imposes heavy costs on other litigants and the judicial system"). In the usual scenario – where the moving party raises the disqualification issues at some point before a final judgment has been rendered – such a concern may well be sound. Once an appellate judgment has been rendered, however, it is somewhat difficult to see how the interests of judicial economy are fostered by insisting that a party who seeks to have that judgment set aside must move for relief by any particular moment in time.

A possible concern which might make sense in the post-judgment scenario (although not one typically

cited by courts which have invoked "implied waiver" in support of a decision to deny consideration of a claim of judicial bias) concerns the desire of courts to insure the finality of their judgments. In my opinion, such a concern might well be legitimate in a situation where reopening the matter would unseat the prevailing party's reasonable assurance that the matter has been laid to rest, once and for all; or where allowing the recusal request would require a new trial in a case where memories may have faded or critical documents have been lost. The concern, in either event, would be that the moving party's alleged delay in raising the recusal issue could result in prejudice to the prevailing party.

In this case, however, such a concern has no applicability. The prevailing party was the government – not an individual – and the government's interest in avoiding having the court re-examine the fairness of the forum which decided its dispute with Petitioner cannot, in my opinion, trump the Petitioner's right to insure that the judgment against it was fair. Perhaps more fundamentally, what is involved is not a potential new trial, but rather an appeal involving an interpretation of the law governing a simple contract dispute. Thus, this Court does not need to be concerned about witnesses having died, or memories have been lost. In fact, for all intents and purposes, the Court could decide the issues raised by Petitioner's appeal just as easily in 2012, as in 2002.

F. Lower Courts Need to Be Advised That They Must Issue Findings of Fact and Conclusions of Law in Section 455 Proceedings.

One final concern, in my view, augurs in favor of granting this Petition. Two decades ago the Eleventh Circuit quoted *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974), for the proposition that "[T]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system")." *Huff v. Standard Life Ins. Co.*, 683 F.2d 1363, 1370 (11th Cir. 1982). Nevertheless, here, the court summarily disposed of Petitioner's Motion to Vacate – which raised the spectacle of such an appearance of bias – with 13 letters: "untimely filed." In my opinion, in a case like this, where an appellate court has been asked to rule on a non-frivolous motion challenging a tribunal's partiality, it is imperative that a higher court have a record before it that will permit meaningful review, should such review of the court's disqualification order (or, as here, denial) be sought.

In the analogous context of motions to disqualify counsel, many courts – including the Tenth Circuit Court of Appeals – have made it clear that, when ruling on a motion for disqualification, the lower court must make specific factual findings and legal conclusions. *See , e.g., United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) ("When a district court disqualifies defendant's counsel of choice, it must make findings on

the record stating the rationale for its action"). In my opinion, it would not be unreasonable to ask that district and appellate courts which deny non-frivolous challenges to a tribunal's impartiality be required to do the same thing.

CONCLUSION

The Petitioner has the constitutional right to be assured that the appellate court's decision reversing the district court's judgment in its favor was the product of unbiased and impartial consideration, and the government has failed to show that any compelling reason warrants overriding that right in this case. I believe this Court should take review to redress this injustice, to clarify the law on "timeliness" and "implied waiver" of the right to object to a judge pursuant to Section 455, and to provide guidance to the lower courts on the need to issue findings of fact and conclusions of law in Section 455 proceedings.

Respectfully submitted,

Richard E. Flamm, Esq.
2840 College Avenue, Suite A
Berkeley, CA 94705
(510) 849-0123

Amicus Curiae